Nos. 833 and 836

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Supreme Court of the United States

October Term, 1967

BOSTON AND MAINE CORPORATION,
Appellant

v.

UNITED STATES OF AMERICA, et al.
Appellees

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al.,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

On Appeals from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

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THE STONE PRINTING & MFG. CO., ROANOKE, VA., U.S.A.

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Norfolk and Western Railway Company moves that the judgment of the three-judge court below, insofar as it dismissed the complaints of Boston and Maine Corporation and John Hancock Mutual Life Insurance Company, et al., be affirmed. In support of this motion to affirm, and in view of this Court's order of November 9, 1967, directing that the briefs filed in the three-judge court below be filed with this Court, Norfolk and Western relies on, and hereby incorporates by reference, the

grounds set forth in its brief dated September 25, 1967 (67 Civ. No. 2451). In addition, N&W states as follows:

Boston and Maine asserts that the terms prescribed for its inclusion in N&W are inadequate because the Commission erred in adopting the estimates offered by B&M's own witness of the savings which would accrue upon the control of B&M by N&W (B&M J. S., p. 15). B&M attempts to belittle the savings study of its witness, Mr. William Wyer, by asserting that Mr. Wyer was somehow constrained by an assumption that "under a control arrangement savings would be limited to those resulting from the consolidation of the traffic solicitation forces of D&H and B&M with those of N&W" (B&M J. S., p. 8). As plainly shown on this record, however, Witness Wyer, rather than relying on any "assumption," based his conclusions on a thorough study of his own. This study was made under the supervision and with the cooperation of B&M personnel under circumstances which obviously presented every incentive for Witness Wyer to maximize his savings estimates (see N&W Brief, Sept. 25, 1967, pp. 15-22). B&M's own savings estimates were fully accepted by the Commission (330 I.C.C. at 834; 331 I.C.C. at 38), and B&M's belated attempts to discredit its own witness present no question meriting this Court's attention.

As is shown fully in N&W's appeal in No. 779 and the briefs filed with this Court, the Commission's error as to the terms prescribed for B&M was not in their inadequacy but in their excessiveness. B&M has experienced deficits every year since 1957, including a deficit of $1.5 million in 1966 (330 I.C.C. at 879). This fact alone makes the Commission's conclusion that B&M would have earnings of $400,000 annually as an independent railroad

incredible. In addition, B&M's experience in 1967 amply demonstrates that the value the Commission assigned to B&M is grossly inflated. In the first nine months of 1967, B&M has been operating at a deficit even greater than those experienced previously. For this period alone, B&M lost $2.9 million.

The appeal of the Erie-Lackawanna bondholders (No. 836) is equally lacking in merit. These appellants claim that special conditions must be imposed to prevent N&W from taking action in controlling EL which is detrimental to the interests of these bondholders. However, as the three-judge court below correctly recognized, the situation of which these bondholders complain is plainly the result of their own intransigence, and, in any event, no special conditions are required to protect their legitimate interests (N&W J. S., App. B., pp. 62-63).*

Affiliation of N&W and EL by way of merger would result in the assumption of EL's debt by N&W. The EL bondholders frustrated such an affiliation by refusing to cooperate in arranging a modification of EL's debt which would make merger possible. EL's management, recognizing that EL's massive debt was an insuperable obstacle to merger, asked its major bondholders, who included two of these appellants, to discuss modification of the debt in order to achieve merger. EL wrote that a choice must be made between two alternative forms of affiliation with N&W: (1) a control arrangement under which "N&W would not be required . . . to assume any direct obligations of Erie Lackawanna . . . " or (2) merger

*The bondholders assert that N&W will have an incentive for such action because "N&W is a more efficient earner than EL . . . " (J. S., p. 9). This record shows, however, that the N&W line which competes with the EL line does not produce pretax net income per dollar of revenues substantially different from the amount used by the Commission for EL (N&W Brf., September 25, 1967, p. 35 & n. 14; N&W Brf., September 5, 1967, p. 31 & n. 19), and the court below specifically rejected the theory upon which the bondholders rely (N&W J. S., App. B, n. 32, p. 49).

which would "require N&W to assume all of Erie Lackawanna's debt outstanding at the time of the merger." EL's management stated: "We believe that it would be impossible to obtain I.C.C. approval of Erie Lackawanna's petition for inclusion if Erie Lackawanna proposed that its debt be assumed directly by N&W without any modification being made therein . . . " (N&W Ex. 4, App. 2, pp. 1-3). The bondholders' response to this inquiry as to whether they would consent to some modification of the debt was: "*no, we'd rather have the company go bankrupt*" (N&W Ex. 4, App. 3, p. 7) (emphasis added).

Having thus rejected the attempt of EL's management to make possible affiliation by way of merger, the bondholders' belated attack upon the control arrangement actually prescribed does not merit this Court's consideration.

WHEREFORE: For the foregoing reasons, the judgment of the court below should be affirmed insofar as it dismissed the complaints of Boston and Maine Corporation and John Hancock Mutual Life Insurance Company, et al.

Respectfully submitted,

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